(8)

No. 94-1654

In The

Supreme Court of the United States

October Term, 1995

GLEN HEISER and GEORGE SPENCER,

Petitioners,

vs.

KEEN A. UMBEHR,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Tenth Circuit

REPLY BRIEF OF PETITIONERS

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RESPONSE TO STATEMENT OF FACTS

Respondent's Statement of Facts is filled with numerous matters which are entirely irrelevant to the claims made by him in this lawsuit. The sole action which respondent has ever alleged as a legal basis for the violation of his First Amendment rights was the vote to terminate his contract in 1991. All of the other activities described in respondent's brief, from disputes over access to public records to the raising of landfill rates, have never been alleged as violations of his First Amendment rights. The Kansas Supreme Court expressly noted in the parallel litigation in which respondent attempted to roll back a landfill rate hike that there had never been any allegation that the rate hike was enacted in violation of Mr. Umbehr's First Amendment rights.

Respondent does not deny that all of his activities were performed in pursuit of his quest for personal political power, as a candidate for office as a county commissioner. He has not denied that all of his public comments ceased as soon as he lost the election. He does not contend that he was motivated by any purpose other than a desire for personal political power and economic gain.

Although he recognizes the clear conflict of interest inherent in having the operator of a lucrative contract with the county become a member of the county commissioners, citing a statute which would prohibit him from voting on the renewal of his contract had he been elected, he acknowledges no legal limit on his right to exercise the powers of the office he sought for the purpose of reversing the landfill rate hike or maintaining the availability of the county landfill for the dumping of refuse collected by

him, even if the decision to do so would have been detrimental to the county.

Respondent refers to no evidence that the decision to terminate his contract was in any way motivated by a desire to silence his publications or was determined by the viewpoint expressed by him. To the contrary, he quotes the testimony of one commissioner whose motivation was to move Umbehr to another forum where the county commission would not be compelled to listen to him. Clearly the disruptive effect of Umbehr's activities was substantial, and his methods materially interfered with the functions of the board and caused near breaches of the peace in commission meetings. All of the events cited by respondent in support of his claim to the protection of the First Amendment really show instead that he was no more than a personal foe of the members of the commission, who attempted to monopolize the time and resources of the county commission to listen to his personal complaints in derogation of the rights of other members of the public to be heard.

Respondent's suggestion that the need to free the county from the existing contract to permit consideration of new financing options and, if necessary, to permit the closure of the landfill was merely pretextual is seriously misleading. Although not reflected in the record because the motions which decided the case were filed four years ago, the county landfill has in fact since been closed, an event which would have been legally wrongful had Mr. Umbehr's contract not been terminated.

The arguments presented by respondent presume, without discussion or analysis, that any action taken

against his wishes must be considered a legal wrong, giving rise to a cause of action under 42 U.S.C. § 1983. The cases relied upon by respondent involve actions which disadvantaged persons who had engaged in First Amendment protected activities, in comparison to others who had not engaged in such activities. No such circumstance is present here. The termination of Mr. Umbehr's contract left him in exactly the same position as any other member of the general public who had never made any public comment offensive to Petitioners. He did not even suffer any monetary loss that appears in the record, since he was able to increase the rates charged five of the six cities which he had previously serviced once the contract had been terminated. There is no evidence that any person was favored over him in any dealings with the county. There is no suggestion that the County Commission in any way discriminated against him on the basis of the viewpoint expressed in his various public appearances. This fact distinguishes the present case from the authorities cited on pages 21-24 of respondent's brief.

Respondent's arguments at pages 28-32 of his brief also avoid addressing the merits of the issue presented to the court here. Whether governmental agencies do or do not have a higher or lower interest in regulating the content of the speech of independent contractors than they have in regulating the content of the speech of employees has no bearing on the relative significance of the governmental agency's right to control its own operations. This case involves no attempt to regulate the content of anyone's speech, whether that person is viewed as an employee or an independent contractor. If anything, respondent, not petitioners, is seeking to regulate speech,

by punishing petitioners for their personal comments in response to his offensive accusations against them. This case confronts the court not with a contention that independent contractors should not have as much freedom as governmental employees from regulation of the content of their speech, but with the more basic question of whether they have the right to seize control of the functions of government by making utterances that are seriously disruptive of governmental operations and threatening suit if their demands for economic advantage are not met.

ARGUMENT AND AUTHORITIES

I. RESPONDENT HAS PRESENTED NO JUSTIFICATION FOR EXTENDING CONSTITUTIONAL PROTECTION TO HIS TRASH HAULING CONTRACT.

Respondent's brief omits all reference to a key element of the test of *Pickering v. Bd. of Education of Township High School District*, 391 U.S. 563, 20 L.Ed.2d 811, 88 S.Ct. 1731 (1968), requiring the court to consider not only the effect of a public servant's activities on his or her own work, but also the effect of the speech activities on the efficient functioning of the operations of the governmental employer as a whole. *Pickering* acknowledged the relevance of any possible disruption of the activities of others, and not just interference with the speaker's own activities, without articulating how that consideration might be applied. See, 391 U.S. at page 573. This principle was described in greater detail and applied in *Connick v. Myers*, 461 U.S. 138, 75 L.Ed.2d 708, 103 S.Ct. 1684 (1983). In *Connick* the court expressly concluded that the plaintiff

employee's activities were protected by the First Amendment and did not impede her own ability to perform her responsibilities. Despite these considerations the plaintiff's firing was deemed to be constitutionally permissible as a matter of law because her activities threatened to disrupt the work of co-employees. The supervising personnel testified that they considered the employee's conduct to be "an act of insubordination which interfered with working relationships." See 461 U.S. at 151, fn. 11. The *Connick* opinion went on to state that the Constitution did not require an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action. See 461 U.S. at 152, fn. 12. In reaching this conclusion, the court relied in part on the separate opinion of Justice Powell in *Arnett v. Kennedy*, 416 U.S. 134, 40 L.Ed.2d 15, 94 S.Ct. 1633 (1974), quoting the following comments:

> To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.

See 461 U.S. at 151.

Respondent's brief nowhere addresses this aspect of the law, preferring instead to focus exclusively on the lack of any proven interference of Mr. Umbehr's First

Amendment activities with his own operations. The lack of discussion of the rule of *Connick* is obviously a result of respondent's complete inability to justify his claims under that rule of law. The recitation of facts appearing in respondent's brief clearly indicates a chronically disruptive attitude by him. His activities induced the Board to take steps which were detrimental to its functioning, including scheduling potentially unlawful closed meetings. Mr. Umbehr's disruption was so severe that he generated obvious antagonism with board members, as is evidenced by the exchange of harsh language quoted in respondent's brief. The discovery record also revealed that Mr. Umbehr's activities so irritated one key county employee that he resigned his employment. Plainly, if Mr. Umbehr had been an employee he could have been fired with full constitutional justification under the test of *Connick v. Myers, supra.* The termination of Mr. Umbehr's contract served the same purpose that firing him as an employee would have served. It turned him into just another member of the general public, with no greater access to information about county operations than others and no special claim to the time or attention of the Board of County Commissioners.

There is no reason why the constitutional interest of the people and their elected representatives in the efficient operation of governmental functions should be ignored when the person who seeks to usurp public functions to himself and interfere with the smooth operation of governmental business is not a common law employee. Mr. Umbehr's activities were especially intrusive upon the smooth functioning of local government because he had a contractual right to demand that the

county landfill be kept open for his use, and because that fact gave him an excuse to monopolize time at the county commission meetings. By terminating the contract the county commissioners gained relief from Mr. Umbehr's unwarranted intrusions into their deliberations.

The contention of respondent that local government may not take action contrary to his economic interests in response to statements made by him in the course of a political campaign are squarely refuted by this court's decision in the case of *Broadrick v. Oklahoma*, 413 U.S. 601, 37 L.Ed.2d 830, 93 S.Ct. 2908 (1973). In that case a state statute which prohibited government employees even from becoming a candidate for public office was affirmed under a test of strict scrutiny. Respondent has repeatedly sought to analogize his status as an independent contractor with the status of government employees.

If the State of Kansas and its subdivisions can require the termination of any public employee who decides to run for political office, it can also certainly allow the termination of any independent contractor performing public services who elects to become a candidate for political office. In fact, Kansas has elected to prohibit public servants from taking office as county commissioners. See Kansas Statutes Annotated 19-205, which states in pertinent part that no person holding any state, county, township or city office shall be eligible to the office of county commissioner in any county. All of Mr. Umbehr's comments were made during the course of his political campaign for the office of county commissioner.

Because the First Amendment would permit a *per se* rule requiring termination of his public servant position

if he became a political candidate at any level, it certainly will tolerate his termination for seeking an office where he would have clear and direct conflict of interest. Respondent admits at page 10 of his brief that had he won election to the commission, he would have had a sufficient conflict of interest to be required to abstain from voting on any issue pertaining to trash collection. The Constitution does not limit the county's remedies for such a conflict of interest to an admonition to abstain from voting on legal action against him, once he has cast a prohibited vote. The county is permitted to require that the conflict of interest never arise, by mandating a termination of the relationship before the public servant is even elected to office.

II. THERE IS NO RATIONAL BASIS FOR GIVING A GOVERNMENTAL AGENCY LESS DISCRETION TO TERMINATE A CONTRACTOR THAN IT HAS TO TERMINATE AN EMPLOYEE.

The legitimate right of governments to control their own operations as articulated in *Pickering v. Bd. of Education of Township High School District*, 391 U.S. 563, 20 L.Ed.2d 811, 88 S.Ct. 1731 (1968), cannot rationally be limited only to those persons who qualify as civil servants or who have a common law contract of employment qualifying them as servants for whose actions the employer is legally responsible. It is the activity performed by the person against whom sanctions have been imposed, not their contractual status, which creates the right of control. Similarly it is the degree of interference with governmental operations, not the performance of the contract of employment or the public nature of the

speech involved, which makes it appropriate for the government to take action in response to speech.

Governmental agencies have a peculiar relationship with contractors to whom they delegate portions of their responsibility to afford services to the general public. The government may have only limited rights to control the activities of individual employees of a governmental contractor, for example, *see, Greene v. McElroy*, 360 U.S. 474, 3 L.Ed.2d 1377, 79 S.Ct. 1400 (1959); *Cafeteria Workers v. McElroy*, 367 U.S. 886, 6 L.Ed.2d 1230, 81 S.Ct. 1743 (1961). Neither the independent contractor nor its employees will be treated as servants, whose wrongful acts impose liability on the governmental principal, even if the contractor works exclusively for the government and earns no outside income. *See, Rendell-Baker v. Kohn*, 457 U.S. 830, 73 L.Ed.2d 418, 102 S.Ct. 2764 (1982). Because government contractors may be performing essential services in behalf of the government, however, they will not be treated the same as private businesses supplying services on the open market, and may appropriately be granted immunity from civil liability for acts performed in furtherance of the government's business *See, Boyle v. United Technologies Corp.*, 487 U.S. 500, 101 L.Ed.2d 442,108 S.Ct. 2510 (1988). Just last term this Court held that the use of an independent contractor to supply printing services for the benefit of a religious organization was constitutionally indistinguishable from the use of governmental employees for the same purpose. In *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, ___ U.S. ___, 132 L.Ed.2d 700, 115 S.Ct. 2510 (1995), a majority of the court held that independent printing contractors who were paid governmental funds for the preparation of religious

publications could be treated the same as governmental employees, rather than being treated as agents of the religious organization, for the purpose of applying the Establishment Clause of the First Amendment. This Court has also held that independent contractors could be treated the same as governmental employees in analyzing the scope of protections afforded persons who invoke their rights under the Fifth Amendment. *See, Lefkowitz v. Turley*, 414 U.S. 70, 38 L.Ed.2d 274, 94 S.Ct. 316 (1973), and *Lefkowitz v. Cunningham*, 431 U.S. 801, 53 L.Ed.2d 1, 97 S.Ct. 2132 (1977)

There is no public interest to be served in granting special privileges to governmental contractors. Independent contractors bargain for their economic rights, and serve the public interest only as long as their services are needed. When the benefits provided by the contractor are outweighed by the burdens perceived by the people and their elected representatives, the contract should be terminated. No contractor should be allowed to rewrite the terms of an agreement which expressly gives the people the right to exercise unfettered discretion in deciding when the burdens of continuing the relationship are too great. Any suggestion that the people's opinion should be ignored must be based on the private interests of the contractors and those who derive economic benefit from them, rather than the public interest. If the public interest requires an assurance of continuity in the relationship, contractual guarantees against termination can be negotiated openly and fairly. There is no need for judicial imposition of tenure rights which are not the result of an honest agreement between the parties to the contract. Politicians may have an interest in protecting the rights of

contractors who make campaign contributions, but this interest is not the public interest. The contracts of campaign contributors are no more deserving of protection than any other political appointment handed out as spoils by politicians.

III. RESPONDENT HAS MISAPPREHENDED BASIC PRINCIPLES OF THE LAW OF LEGISLATIVE IMMUNITY AND CIVIL RIGHTS

Respondent's brief suggests that legislative immunity would not prevent recovery against an employer, but would only protect individual actors from personal judgments. Respondent also suggests that a federal civil rights remedy should be available even if an adequate state court remedy already exists, because the doctrine of exhaustion of administrative remedy does not apply to civil rights actions. Respondent has misconstrued the law on both of these issues.

The doctrine of legislative immunity is broader than the doctrine of qualified immunity. Legislative immunity prevents the recovery of damages not only from individual actors, but also from the governmental entity itself. See, for example, *Fry v. Board of County Commissioners of Baca Co.*, 7 F.3d 936 (10th Cir. 1993); *Lake Country Estates, Inc v. Tahoe Regional Planning Agency*, 440 U.S. 391, 59 L.Ed.2d 401, 99 S.Ct. 1171 (1979); *Tenney v. Brandhove*, 341 U.S. 367, 95 L.Ed. 1019, 71 S.Ct. 783 (1951). The opinion of the Tenth Circuit Court of Appeals in this matter did not hold otherwise, contrary to the comments in Respondent's brief at pp. 44-45. The Tenth Circuit did not rule that legislative immunity either did not apply or would be unavailing against official capacity claims. Instead, its

opinion stated that the applicability of legislative immunity was a "close question", lending credence to the application of qualified immunity to the claims against petitioners in their individual capacities.

This court has long recognized that federal courts should not interfere with the operations of state government where there is an adequate remedy under state law, and that relief under 42 U.S.C. § 1983 is not available where the adequacy of the remedy available in state court renders that relief unnecessary. See, for example, *National Private Truck Council, Inc. v. Okla. Tax Com'n*, ___ U.S. ___, 132 L.Ed.2d 509, 115 S.Ct. 2351 (1995); *Albright v. Oliver*, ___ U.S. ___, 127 L.Ed.2d 114, 114 S.Ct. 807 (1994); *Parratt v. Taylor*, 451 U.S. 527, 68 L.Ed.2d 420, 101 S.Ct. 1908 (1980). General principles of judicial comity also require federal courts to respect the integrity and function of local governmental institutions which are ready, willing and able to remedy any deprivation of constitutional rights. *See, Missouri v. Jenkins*, 495 U.S. 33, 109 L.Ed. 2d 31, 110 S.Ct. 1651 (1990); *Bush v. Lucas*, 462 U.S. 367, 76 L.Ed.2d 648, 103 S.Ct. 2404 (1983). The adequacy of state law remedies clearly is relevant in determining whether a remedy will be made available under 42 U.S.C. § 1983, which is the statutory provision invoked by the plaintiff in this case. *See, Zinermon v. Burch*, 494 U.S. 113, 108 L.Ed.2d 100, 110 S.Ct. 975 (1990); *Hudson v. Palmer*, 468 U.S. 517, 82 L.Ed.2d 393, 104 S.Ct. 3194 (1984). The adequacy of remedies available under the laws of Kansas in its own courts would become irrelevant only if Mr. Umbehr could show that he was a victim of an established procedure, rather than a single instance of personally motivated retaliatory conduct. *See, Logan v.*

Zimmerman Bruch Co., 455 U.S. 422, 71 L.Ed.2d 265, 102 S.Ct. 1148 (1982).

Petitioners are not asking this court to deprive any plaintiff of a federal remedy where a content-based prior restriction of the rights of independent contractors is adopted as a matter of policy. Because we are dealing here only with a post-speech retaliatory sanction imposed by individuals allegedly for their personal gratification rather than pursuant to any governmental policy, the rule of *Parratt* would plainly apply to prevent any remedy under § 1983 so long as an adequate remedy is available in Kansas courts. Respondent apparently does not deny that a fully adequate remedy is available under Kansas law, as established in his own parallel lawsuit reported as *Umbehr v. Board of Wabaunsee County Com'rs*, 843 P.2d 176, 252 Kan. 30 (1992).

CONCLUSION

For the foregoing reasons, petitioners adopt the conclusions stated in their initial brief.

Respectfully submitted,

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